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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE PETITIONER

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American Export Lines, Inc.,

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Gilberto Alvez and
Joseph Vinal Ship Maintenance, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of Justice Bernard Nadel of the New York State Supreme Court, Special Term, New York County, which denied the plaintiff's motion to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium, is not reported, and is printed in the Appendix, A, at A1.

The opinion of the New York State Supreme Court, Appellate Division, First Department, which reversed Justice Nadel's decision and granted the motion to amend the complaint is reported at 59 App. Div. 2d 883, 399 N.Y.S. 2d 673 (1st Dep't 1977) and is printed in the Appendix, B,

at A2-A5. The order of the New York State Supreme Court, Appellate Division, First Department, granting the motion of American Export Lines, Inc. to appeal to the New York State Court of Appeals is not reported, and is printed in the Appendix, C, at A6-A7.

The opinion of the New York State Court of Appeals, which, in a 5-1 decision, affirmed the decision of the New York State Supreme Court, Appellate Division, First Department, is reported at 46 N.Y.2d 634, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979), and is printed in the Appendix, D, at A8-A19.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 3, 1979. The petition for certiorari was filed on July 2, 1979, and was granted on October 29, 1979. This brief was filed within forty-five days from that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). [See also Supreme Court Rule 19(1)(a).]

Questions Presented

In *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974) this Court permitted the recovery of damages for loss of society in a *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970) wrongful death cause of action under the General Maritime Law. Following this decision, some lower courts have construed *Gaudet* as applicable in maritime personal injury actions. The questions presented are:

1. Whether loss of consortium damages may be recovered in maritime personal injury actions, when such recovery

has been precluded by the Jones Act, the Federal Employers' Liability Act, the Death on the High Seas Act, and the pre-*Gaudet* decisions in maritime injury actions?

2. Whether the pre-existing uniformity in the Federal Maritime Law should be abrogated by permitting such non-pecuniary recovery to the spouse of an injured maritime worker?

3. Whether an unfair, anomalous, and wholly unnecessary distinction should be created in the Federal Maritime Law, which denies loss of consortium damages to the spouse of an injured seaman, so as to permit recovery to the spouse of an injured harbor worker, a surrogate seaman, whose maritime rights have historically been derived from his prototype, the true seaman?

4. Whether the New York Court of Appeals, or any state court, should be permitted to reject the precedential authority of the federal appellate courts when deciding an issue of Federal Maritime Law?

Statutes Involved

Death on the High Seas Act
41 Stat. 537, 46 U.S.C. §761

Right of action; where and by whom brought

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States,

in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Death on the High Seas Act
41 Stat. 537, 46 U.S.C. §762

Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Federal Employers' Liability Act
35 Stat. 65; 53 Stat. 1404, 45 U.S.C. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such

employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Jones Act
38 Stat. 1185; 41 Stat. 1007, 46 U.S.C. §688

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under

the court of the district in which the defendant employer resides or in which his principal office is located.

Longshoremen's and Harbor Workers' Compensation Act
44 Stat. 1426, 33 U.S.C. §905

Exclusiveness of liability (Prior to 1972 Amendments)

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Longshoremen's and Harbor Workers' Compensation Act
44 Stat. 1426; 86 Stat. 1263, 33 U.S.C. §905

Exclusiveness of liability (Subsequent to 1972 Amendments)

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, de-

pendents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the

time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Statement

Gilberto Alvez, a seaman on vacation, was moonlighting as a lasher-employee of respondent Joseph Vinal Ship Maintenance, Inc. In doing so, he lost an eye while working aboard the SS EXPORT BUILDER, a vessel owned by petitioner American Export Lines, Inc., on October 13, 1972. He brought suit for negligence and unseaworthiness against the shipowner, which in turn impleaded Joseph Vinal Ship Maintenance, Inc.[1]

Alvez subsequently moved to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium. This motion was summarily denied by Justice Bernard Nadel of the New York State Supreme Court. (App. A, at A1). On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint. (App. B, at A2-A5). Subsequently, that court permitted American Export Lines, Inc. leave to appeal to the New York State Court of Appeals, certifying a question to that court for resolution. (App. C, at A6-A7).

The New York State Court of Appeals, in a 5-1 decision, affirmed the New York State Supreme Court, Appellate Division, First Department, and permitted the cause of action

[1] The employer third-party was impleaded prior to the effective date of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, which *inter alia*, eliminated the longshoreman's cause of action for unseaworthiness.

for loss of consortium damages to stand, asserting that the Federal Maritime Law on this question was unsettled. (App. D, at A8-A19).

Summary of Argument

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court created a wrongful death cause of action under the General Maritime Law. The Court left open to future cases the determination of damages permitted under this federal remedy. There then ensued some confusion in the lower courts as to the proper measure of damages to be applied. Next, this Court decided *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), wherein the *Moragne* wrongful death remedy was expanded so as to include a claim for loss of consortium by the widow of a longshoreman who died after having been injured within territorial waters.[2] Subsequently, in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) the Court held that *Gaudet* damages could not be recovered in a wrongful death cause of action governed by the Death on the High Seas Act (hereinafter referred to in the Brief as "DOHSA") since that statute limits recovery to "pecuniary loss."

It is against this backdrop of wrongful death remedy and consequent damages that the present facile effort was made to transplant the rights of a widow to a personal injury action. This Brief will address this attempt as an unwarranted qualitative, rather than a quantitative leap.

[2] The terms "loss of society" and "loss of consortium" have been used interchangeably throughout this Brief. As this court noted in *Gaudet*, 414 U.S. at 589, loss of consortium "encompasses loss of society." The Court defined loss of society as the "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Id.* at 585 (footnote omitted).

I

The landmark decision of the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964) denied loss of consortium recovery to the spouse of an injured longshoreman. Judge Friendly, after studying the common law on the subject, relied heavily on the fact that the spouse of an injured seaman could not recover loss of consortium damages under Federal Maritime Law as expounded by Congress in the Jones Act. Despite the fact that a majority of states now permit recovery by the wife for loss of her husband's consortium, *Igneri's* rationale, bottomed on the analogous Jones Act, is today the best exposition of the Federal Maritime Law.

The *Igneri* court also considered the Federal Employers' Liability Act (hereinafter referred to in the Brief as "FELA"), "the regime which the Jones Act made applicable to seamen," and which had been "authoritatively construed before the Jones Act was passed." *Id.* at 266. FELA provided the uniform and exclusive method of recovery for damages sustained as a result of injury to a railway employee, and also uniformly denied consortium recovery to the spouse. Since Congress did not permit such recovery under either the Jones Act or FELA, the *Igneri* court concluded that it would be anomalous to permit such recovery to a longshoreman, as such would indeed result in "capricious differences in treatment between similarly situated persons." *Id.* at 267.

The *Igneri* rule denying consortium recovery to the spouse of an injured maritime worker, irrespective of the sex of such worker, was uniformly followed until the decision of this Court in *Gaudet,* a wrongful death case. Indeed, it should be noted that *Gaudet* has no applicability to a personal injury cause of action. The decision in

Gaudet explained the remedies available under the *Moragne* maritime wrongful death remedy, and created no inference that such a holding should be extended beyond the scope of a wrongful death situation. In delineating the damages recoverable thereunder, the Court specifically noted that such losses "could not accrue until the decedent's death." 414 U.S. at 592.

Notwithstanding such limiting language, lower state and federal courts began to split as to the maintainability of such a cause of action. However, the only federal appellate court to squarely face the issue subsequent to *Gaudet,* the Fifth Circuit in *Christofferson* v. *Halliburton Co.,* 534 F.2d 1147 (5th Cir.), *rehearing en banc denied,* 542 F.2d 1174 (5th Cir. 1976) found the *Igneri* rule still valid and denied consortium recovery to the spouse of an injured seaman. Therefore, the only two federal appellate courts to specifically address the issue of loss of consortium recovery by the spouse of an injured maritime worker—*Igneri* eleven years before *Gaudet* and *Christofferson* two years after *Gaudet*—both denied such recovery. In sum, *Gaudet* has left undisturbed the Federal Maritime Law on the damages recoverable in a maritime personal injury action, though boiling the waters of uniformity.

Since the policies underlying *Gaudet* have their bases in wrongful death cases and statutes, their applicability should be limited thereto. Therefore, the uniformity which existed in this area of Federal Maritime Law governing personal injury cases prior to the decision in *Gaudet* should be reinstated by this Court.

II

In the vast majority of maritime wrongful death cases, the Federal Maritime Law precludes recovery for non-pecuniary damages. The Jones Act has been consistently

interpreted both prior and subsequent to *Gaudet*, as permitting recovery only for the pecuniary loss suffered by the seaman or his designated beneficiaries. Additionally, this Court in *Higginbotham*, by affording no different treatment to the Jones Act seamen involved therein, implicitly affirmed such a construction of the Jones Act in a wrongful death case. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732, 738 (5th Cir. 1978), *rehearing en banc*, No. 76-4130 (5th Cir., Nov. 13, 1979).

Similarly, FELA has long been interpreted as precluding recovery for nonpecuniary damages in a wrongful death action. *Michigan Central Railroad* v. *Vreeland*, 227 U.S. 59 (1913). Numerous other decisions by this Court, and by federal and state courts have uniformly denied recovery of nonpecuniary damages in FELA wrongful death actions.

DOHSA, by its statutory language, limits recovery to the "pecuniary loss sustained." This Court in *Higginbotham* explicitly affirmed the validity of such a provision.

The only maritime death cases wherein nonpecuniary damages have been recovered are post-*Gaudet*, non-Jones Act, non-FELA, non-DOHSA cases. Prior to *Gaudet*, nonpecuniary damages, such as loss of consortium, had uniformly been denied. Following the *Gaudet* mandate, decisions have permitted such recovery in death cases under the General Maritime Law, although noting that nonpecuniary recovery was still precluded by the Jones Act.

In light of the statutory and judicial preclusion of such nonpecuniary damages under the Jones Act, FELA, and DOHSA, the *Gaudet* decision permitting such recovery in General Maritime Law wrongful death cases has restored nonuniformity in this area of Federal Maritime Law, without substantial reason therefor.

III

In *Moragne*, this Court created a wrongful death cause of action under the General Maritime Law, carefully noting that there was no evident Congressional policy precluding such recovery. When the Court left open to future cases the determination of the specific recoveries to be permitted under this federal remedy, there was some confusion in the lower courts as to the proper measure of damages to be applied. The Court then decided *Gaudet*, wherein the *Moragne* wrongful death remedy was expanded so as to include a claim for loss of consortium by a widow. Specifically, the Court permitted wrongful death recovery, notwithstanding that the decedent had recovered damages in a personal injury cause of action prior to his death. Although noting that most state and federal wrongful death statutes would not have permitted such a result, this Court felt that the judicially created *Moragne* wrongful death remedy should not be bound by statutory restrictions. While the *Moragne* Court deferentially examined Congressional enactments in first prescribing this judicially created wrongful death remedy, *Gaudet* sought to minimize the significance of such considerations on the grounds that the *Moragne* remedy had been judicially and not statutorily created. Dissimilarly, the *Gaudet* Court permitted recovery for loss of society, since the majority of the state statutes now permitted it.

In *Higginbotham*, the Court delineated the limitations of *Gaudet*, namely that it applied only within territorial waters. This latter decision signalled a retreat from the broad reading which had been ascribed to *Gaudet* by certain courts, and the Court itself noted that it had been possible to misinterpret *Gaudet* as having entirely replaced DOHSA.

The elimination of anomalies in the Federal Maritime Law, especially those hinging on geographical location of the tort in maritime personal injury or death cases, has long been a goal of this Court. *Moragne* had been designed to eliminate such an anomaly by creating a federal wrongful death statute so that recovery did not depend on the applicable provisions of the various state wrongful death statutes. However, *Gaudet,* in permitting loss of consortium damages, left such an anomaly when the Court in *Higginbotham,* faced with the applicability of DOHSA, could not ignore Congressional intent.

The situation facing the Court today does not require the creation of a further anomaly in the Federal Maritime Law between the rights of harbor workers and seamen. In *Higginbotham,* the Court was confronted with the clear applicability of a Congressional statute compelling that a distinction be made from its prior decision in *Gaudet.* Here, the Court is faced with a similar issue in conforming to the intent of Congress in the Jones Act's proscription against loss of consortium.

IV

It has long been a policy of this Court to uniformly treat injuries to similarly situated persons on vessels. In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), this Court permitted longshoremen to sue for unseaworthiness under the General Maritime Law reasoning that since seamen and longshoremen were engaged in a common pursuit for the shipowner, they should be afforded the same, but not greater, protection under the law.

In construing the Jones Act, this Court has placed reliance upon the inaction of Congress to change a result which had been previously determined by this Court. *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964).

Similarly, the *Igneri* decision denying consortium recovery to the spouse of an injured longshoreman had been decided nearly ten years prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to in the Brief as "LHWCA"). This decision, uniformly accepted and applied throughout the country until the decision of this Court in *Gaudet,* had not been questioned at the time of such Amendments.

V

Uniformity has long been the goal of the Federal Maritime Law, and has its ultimate base in Article III, Section 2 of the United States Constitution. This Court has ruled that state statutes are not applicable where they would destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 217 (1917).

Consideration of state law is not applicable to the issues presently before this Court. The availability or non-availability of a cause of action by a wife to recover for loss of consortium under New York Law or the law of any other state is wholly irrelevant. Similarly, the subsequent changes in the common law which now permit a wife's cause of action for loss of consortium are unrelated to this decision. Although *Igneri* looked to the common law, it based its decision on analogy to the preclusion of a cause of action for loss of consortium by the spouse of a seaman under the Jones Act.

Indeed, looking to state law for the rights of a spouse is inappropriate in questions of Federal Maritime Law. Maritime law denies consortium recovery to the spouse of an injured maritime worker irrespective of the sex of either party. The only discrimination which may result in such a

situation would be the creation of an anomalous result whereby the spouse of an injured longshoreman could recover for loss of consortium even though the spouse of an injured seaman could not under the Jones Act.

ARGUMENT

I.

Federal Maritime Law Had Overwhelmingly Denied Recovery for Loss of Consortium in Personal Injury Actions Prior to the Decision of This Court in *Gaudet*, a Wrongful Death Case.

A. Pre-*Gaudet* Maritime Personal Injury Cases Denied Recovery for Loss of Consortium Damages

In 1911, the Second Circuit in *Savage* v. *New York, Newfoundland & Halifax Steamship Co.*, 185 F. 778, 781 (2d Cir. 1911), held: "No instance of what is in substance an action per quod consortium amisit has been shown in admiralty." One year later, the Third Circuit disagreed with *Savage* in *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (3d Cir. 1912) and permitted recovery for loss of "aid, comfort and society" to the spouse of an injured passenger. However, in that decision, the Third Circuit placed its reliance on inapposite cases, namely *Plummer* v. *Webb*, 19 F. Cas. 891 (C.C.D. Me. 1827) (No. 11,233), which permitted a father to sue in admiralty for the tortious abduction of his son, and *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578), which permitted a husband to recover for the death of his wife.

Following this early disagreement between the Second and Third Circuits, there were no reported decisions regarding loss of consortium in a maritime personal injury

action for more than forty years.[3] In *Westerberg* v. *Tide Water Associated Oil Co.*, 304 N.Y. 545, 110 N.E. 2d 395 (1953), the New York Court of Appeals, possibly due to the dubious reasoning utilized by the Third Circuit, experienced no difficulty in denying consortium recovery to the spouse of an injured seaman, noting that the maritime tort "cannot serve as a basis for plaintiff's complaint which demands relief of a character not within the purview of the . . . Jones Act." 304 N.Y. at 547. This decision was followed five years later by the Ninth Circuit in *Jordan* v. *States Marine Corp.*, 257 F.2d 232 (9th Cir. 1958). In 1959, the Southern District of New York in *Bergamaschi* v. *Isthmian Lines, Inc.*, [1959] A.M.C. 1862 (S.D.N.Y.), denied recovery for loss of consortium to the spouse of an injured longshoreman, and was followed three years later by the Eastern District of Michigan in *Pruitt* v. *M.S. Rigoletto*, 211 F. Supp. 295 (E.D. Mich. 1962). The next year marked the landmark decision of the Second Circuit Court of Appeals in *Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

There, Theresa Igneri sought to recover damages for loss of "compensation, support, love, affection, and consortium," due to the injuries sustained by her longshoreman husband. After an exhaustive review of the authorities, Judge Friendly affirmed the district court's dismissal of the loss of consortium cause of action, and held that "the scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly

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[3] In *Hitaffer* v. *Argonne Co.*, 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), recovery for loss of consortium was permitted under the LHWCA. However, the case appears to have had no maritime aspect, and the LHWCA was involved only due to its adoption as the Workman's Compensation Statute applicable in the District of Columbia. D.C. Code §§ 36-501, 36-502. *See Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257, 260, n. 4 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

injured." *Id.* at 268. The basis of the decision in *Igneri* was twofold: first, that the common law generally did not recognize a wife's cause of action for loss of consortium damage; and second, that the Jones Act precluded recovery for loss of consortium by either spouse. As to the common law, *Igneri* noted that maritime law often looks to the law prevailing on the land. The court found no support there on which to premise the wife's cause of action since the common law, as then interpreted, did not uniformly permit such a cause of action, but rather the majority of decisions had denied it. The court then considered the statutory maritime law, and based its decision on analogy to the Jones Act, not the common law. *See Westcott* v. *McAllister Brothers,* 463 F. Supp. 1039, 1041 (S.D.N.Y. 1978). As this Court noted in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 386-87 (1970):

> "Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law." (footnote omitted).

Instead of relying on the common law, Judge Friendly drew analogical support for his decision from the provisions of DOSHA and the Jones Act. After analyzing both Acts, Judge Friendly concluded that neither one permitted a nonpecuniary consortium recovery. More specifically related to the issue before the court was the Jones Act, and *Igneri* concluded that its failure to permit recovery for loss of consortium by the spouse of an injured seaman "cannot be dismissed as an inadvertence." 323 F.2d at 266.

The statutory language of the Jones Act precludes a claim for loss of consortium damages, since the cause of

action permitted thereunder limits it to "any seaman." The proscription cannot be any plainer. There is no legislative history to indicate that the cause of action was intended to be brought by anyone other than a seaman. As this Court long ago noted in *Caminetti* v. *United States,* 242 U.S. 470, 485 (1916):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." (citations omitted).

As the Jones Act clearly states, the right to bring the action is limited to "any seaman." By definition, an action for loss of consortium must be brought by the spouse of a seaman, as such a claim is derivative from the main cause of action. Therefore, the Jones Act, by its statutory provision, does not apply to such an action for loss of consortium. Recognizing this, the *Igneri* court stated:

> "When Congress, by the Jones Act, 46 U.S.C. § 688, gave a seaman the right to recover for personal injury caused by the employer's negligence, it did not authorize recovery by the seaman's wife for loss of consortium. As to non-fatal injuries this is plain from the language of the statute, which authorizes only the seaman himself (not his wife) to 'maintain an action for damages at law.' . . .
>
> It is true that, as a longshoreman, Peter Igneri, unlike a seaman, had a right to recover for personal injury for negligence of the vessel, based on non-statutory maritime law. . . . But that does not mean that in considering the novel question whether the spouse of a

longshoreman should be allowed to recover for loss of consortium, we should ignore the maritime law denying any such right to the spouse of a seaman. The failure of the Jones Act to confer such a right on the spouse of a seaman cannot be dismissed as an inadvertence. The policy of the Federal Employers' Liability Act, the regime which the Jones Act made applicable to seamen, was that the new remedy for the employee was to be exclusive and that claims of relatives recognized by state law were to be abrogated; the FELA had been thus authoritatively construed before the Jones Act was passed. . . ." *Id.* at 266 (citations omitted).

The Jones Act incorporates FELA by its provision that in Jones Act cases, "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." As Mr. Justice Black stated in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942):

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' . . . The Act is based upon, and incorporates by reference, the Federal Employers' Liability Act, which also requires uniform interpretation." (citations omitted).

FELA, therefore, established a comprehensive, national, uniform rule, providing the exclusive method of recovery for damages sustained as a result of injury to a railroad employee. See *New York Central & Hudson River Railroad* v. *Tonsellito*, 244 U.S. 360 (1917); *New York Central Railroad* v. *Winfield*, 244 U.S. 147 (1917); *Sarik* v. *Pennsylvania Railroad*, 68 F. Supp. 630 (W.D. Pa. 1946). Following the seminal decision of this Court in *Michigan Central Railroad*

v. *Vreeland*, 227 U.S. 59 (1913) limiting recovery under FELA to the pecuniary loss sustained (discussed in Point II (B), *infra*), the courts have uniformly denied recovery for loss of consortium to the spouse of an injured employee. As noted by the Ninth Circuit in *Jess* v. *Great Northern Railway*, 401 F.2d 535, 536 (9th Cir. 1968), in denying such recovery:

> "The Federal Employers' Liability Act not only provides the exclusive remedy for the recovery by an employee of damages sustained by him as the result of an injury to him, but also governs the recovery by others for damages resulting from such injury."

Other cases have similarly denied recovery of consortium damages in FELA personal injury cases. *See Anderson* v. *Burlington Northern, Inc.*, 469 F.2d 288 (10th Cir. 1972); *Greethurst* v. *Bethlehem Steel Corp.*, 380 F. Supp. 638 (N.D. Ind. 1974); *Louisville & Nashville Railroad* v. *Lunsford*, 216 Ga. 289, 116 S.E.2d 232 (1960); *Howes* v. *Baker*, 16 Ill. App. 3d 39, 305 N.E.2d 689 (1973); *Spinola* v. *New York Central Railroad*, 33 App. Div. 2d 74, 305 N.Y.S.2d 437 (1969); *Kinney* v. *Southern Pacific Co.*, 232 Or. 322, 375 P.2d 418 (1962); *cf. Sarik* v. *Pennsylvania Railroad*, 68 F. Supp. 630 (W.D. Pa. 1946) (not permitting husband to sue under FELA for the injuries sustained by his wife); *Prata* v. *National Railroad Passenger Corp.*, 70 App. Div. 2d 114, —— N.Y.S.2d —— (1979) (denying consortium recovery in FELA personal injury action subsequent to *Gaudet*).

Following the examination into the provisions of the Jones Act, and those of FELA which were incorporated therein, the *Igneri* court expanded on the policy reasons effectively precluding a consortium award to the wife of an injured longshoreman.

"Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against the ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's. . . . We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore. . . ." *Id.* at 267-68.

The *Igneri* Court was concerned with promoting uniformity in the law of recovery for maritime personal injuries. It also attempted to avoid creating unnecessary anomalous distinctions between these similar workers in a maritime context. "The same considerations as to the desirability of uniformity that are relevant to the relations between a ship and those who work upon her apply with like force to claims by a worker's wife resulting from an injury to him." *Id.* at 259. Therefore, to avoid "capricious differences in treatment between similarly situated persons," the *Igneri* Court held that no such recovery was permitted the spouse of an injured longshoreman.

Following *Igneri,* the New York Supreme Court denied consortium recovery to the husband of an injured passenger in *Rogers* v. *City of New York,* 46 Misc. 2d 373, 259 N.Y.S.2d 604 (Sup. Ct. 1965), and the District of Maryland refused such recovery to the spouse of an injured longshoreman in *Sanseverino* v. *Alcoa Steamship Co.,* 276 F. Supp. 894 (D. Md. 1967). At this point, there was indeed uniformity in the Federal Maritime Law on the issue of recovery for loss of consortium in personal injury cases. That uniformity was destroyed by the decision of this Court in *Gaudet,* a

wrongful death case, which a number of courts have incorrectly interpreted as applying to all actions, whether they involve personal injury or death.

B. The Decision in *Gaudet*, a Wrongful Death Case, Has No Applicability to Maritime Personal Injury Actions

Following the decision of this Court in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), a wrongful death case, the lower courts facing the issue of loss of consortium damages in maritime personal injury cases have been split as to whether such recovery is permitted. The uniformity which had existed prior to *Gaudet,* and which had denied such recovery, was now destroyed. Such a result was wholly unnecessary since *Gaudet,* a wrongful death case, has no applicability to maritime personal injury actions.

Nevertheless, some courts have erroneously interpreted *Gaudet* as overruling the *Igneri* rule denying recovery in maritime personal injury situations. The falsity of such an interpretation should be evident from an analysis of this Court's opinion in *Gaudet.* Specifically, this Court held:

"[U]nder the maritime *wrongful-death* remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." 414 U.S. at 584 (emphasis added).

No mention was made, nor inference created, that such a holding should be extended beyond the scope of a wrongful death situation. Indeed, rather than implicitly recognizing a cause of action for loss of consortium to the wife of an injured longshoreman, this Court in *Gaudet* all but explicitly rejected such a notion.

"Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society,

and funeral expenses. *Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death.*" *Id.* at 591-92 (emphasis added).

Just as *Moragne* left open to later cases specific recoveries to be permitted under the maritime wrongful death action, and created some uncertainty in lower courts throughout this country as to what elements could be recovered until the decision in *Gaudet*, so also did *Gaudet* lead to erroneous holdings as to what elements of damages could be recovered thereunder. (See discussion in Point II (C), *infra.*) Therefore, notwithstanding the limiting language of the Court, some lower state and federal courts have refused to follow the *Igneri* rule denying consortium recovery, concluding in a convoluted manner that *Gaudet*, a wrongful death case, had somehow affected the continued validity of *Igneri* in maritime personal injury actions. However, the policies considered and utilized by this Court in *Gaudet* have their bases in wrongful death cases and statutes, and their applicability should be limited thereto.

C. Although a Wrongful Death Case, *Gaudet* Unintentionally Destroyed the Doctrine of Uniformity Which Had Denied Loss of Consortium Damages in Maritime Personal Injury Actions

The first court to rule on this issue after the *Gaudet* decision, the Florida Appellate Court, cited *Igneri* and held that no recovery was permitted to the spouse of an injured longshoreman. *Davidson* v. *Schlussel Reederi KG*, 295 So. 2d 700 (Fla. App. 1974). However, in *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975) a California intermediate court permitted a wife's action for loss of consortium due to injuries received by her longshoreman husband, concluding that *Igneri* had been overruled by *Gaudet* and *Skidmore* v. *Grueninger*, 506 F.2d 716

(5th Cir. 1975), even though both of those cases were wrongful death actions.

In *Conley* v. *United Overseas Export Lines, Ltd.*, Civ. No. H-76-590 (D. Md., Sept. 28, 1976), Judge Harvey of the District of Maryland granted a motion to dismiss a claim for loss of consortium to the spouse of an injured longshoreman. However, in *Lemon* v. *Bank Lines, Ltd.*, 411 F. Supp. 677 (S.D. Ga. 1976), *rev'd on reconsideration*, No. CV 476-33 (S.D. Ga., March 14, 1977), *reversal aff'd without opinion*, 562 F.2d 1259 (5th Cir. 1977), Judge Lawrence of the Southern District of Georgia aligned himself with the *Pesce* Court, and denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. The rationale used by the district court in *Lemon* fails for the same reason as it does in *Pesce.* Indeed, such a failure was later recognized by Judge Lawrence when he reversed his decision and dismissed the complaint on the authority of *Christofferson* v. *Halliburton Co.*, 534 F.2d 1147 (5th Cir.), *rehearing en banc denied*, 542 F.2d 1174 (5th Cir. 1976). The *Christofferson* court denied recovery for loss of consortium to the spouse of an injured seaman. That court correctly noted that *Gaudet* applied only to wrongful death situations, and did not imply that recovery would be permitted for loss of consortium arising out of an injury to a maritime worker:

> "Restricting loss of society to that arising after the death of an injured maritime worker indicates no intention to create an action for loss of consortium under the general maritime law where the husband was not fatally injured." *Id.* at 1150-51.

The court upheld the continuing validity of *Igneri*, since *Gaudet had* "implicitly limited a claim for loss of society to a maritime wrongful death action . . ." *Id.* at 1150.

Additionally, the Fifth Circuit relied on the statutory prohibition in the Jones Act against anything but direct recovery by the injured seaman himself in a negligence suit, and on the principle that such a right was also non-existent under the General Maritime Law.

> "When Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.'" *Id.* at 1149.

Therefore, the *Christofferson* court held that the consortium cause of action had been properly dismissed by the district court for two reasons: first, that under the Jones Act, a seaman and not his wife may recover damages; and second, that courts have held that the wife of an injured employee cannot recover for loss of consortium under FELA. (See discussion in Point I (A), *supra.*)

That same year also demonstrated the first clear example of the internal anomalies created by the lower courts' attempt to discern the true meaning of this Court's decision in *Gaudet.* In *Consolidated Machines, Inc.* v. *Protein Products Corp.,* 428 F. Supp. 209 (M.D. Fla. 1976), a limitation of liability petition was filed in response to personal injury and death claims by and on behalf of persons who had been exposed to hydrogen sulphide gas. In listing the elements of damages to be awarded under the General Maritime Law, the court permitted recovery for loss of society on behalf of those who died, while denying it to the spouses of those who were injured. *Id.* at 228.

The following year, in *Giglio* v. *Farrell Lines, Inc.,* 424 F. Supp. 927 (S.D.N.Y. 1977), *appeal denied,* No. 77-

8014 (2d Cir., Feb. 17, 1977), Judge Lasker in the Southern District of New York denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. The court noted that the common law had changed since *Igneri* had been decided, and that *Gaudet* had permitted loss of society in a wrongful death case. This led the court to conclude "that compensation for such loss may well be an idea whose time has come." *Id.* at 930. Acknowledging that his conclusions ignored *Igneri's* teachings, Judge Lasker certified the question for appeal to the Second Circuit, but in an unreported opinion, the Second Circuit denied defendant's petition for leave to appeal, and Giglio's action has since been dismissed on the merits, although an appeal is pending. No. 79-7078 (2d Cir., 1979).

Similarly, citing *Giglio* and *Gaudet,* the District Court for the Virgin Islands in *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828 (D.V.I., 1977), permitted the wife of an injured seaplane pilot to recover for loss of consortium. However, that same year, the District Court of Maryland refused such recovery to the wife of an injured longshoreman in *Wetters* v. *Moore-McCormack Lines,* [1977] A.M.C. 1529 (D. Md.), stating:

> "In actions for wrongful death, damages for loss of consortium can be awarded under the general maritime law to the spouse of any maritime death victim, whether longshoreman or seaman. Therefore, in permitting damages for loss of consortium in wrongful death cases, the Supreme Court in *Gaudet* did not create any distinction between a longshoreman and a seaman.
>
> In effect, this Court must choose between two distinctions. In following *Lemon* and *Pesce,* this court would permit the spouse of an injured longshoreman

to recover when the spouse of an injured seaman could not. In following *Igneri,* the court perpetuates a distinction between recovery if a longshoreman is injured and recovery if he is killed. If a longshoreman is injured, his spouse cannot recover for loss of consortium. However, if he is killed, his spouse may so recover.

As Congress in the Jones Act did not extend the recovery to the spouse of an injured seaman, this court will continue to limit the recovery of the spouse of an injured longshoreman and will not permit that spouse to recover damages for loss of consortium. It appears to the court to be more equitable to follow *Igneri* than to permit the spouse of a longshoreman to recover for loss of consortium when the longshoreman is injured or killed when the spouse of a seaman can recover only when the seaman is killed." *Id.* at 1537-38.

The next year, Chief Judge Northrop of the District of Maryland granted a motion to dismiss a claim for loss of consortium by the spouse of an injured longshoreman in *Merriman* v. *Atlantic & Gulf Stevedores, Inc.,* Civ. No. N-76-1659 (D. Md., Aug. 31, 1978). Similarly, Judge Sand of the Southern District of New York denied loss of consortium recovery to the spouse of an injured seaman in *Westcott* v. *McAllister Brothers,* 463 F. Supp. 1039 (S.D. N.Y. 1978), answering in the negative "the question, whether in the face of a statute which limits recovery to the seaman himself, this court may fashion a remedy for the seaman's wife." *Id.* at 1042. In analyzing the effect of this Court's decisions in *Higginbotham* and *Gaudet,* respectively, the court held:

> "Bearing in mind the Court's admonition with respect to the creation of 'supplementary' remedies in the context of the statutory remedy of DOHSA, we must inquire as to whether there is any reason for a different rule where the action is brought by the wife of an injured seaman under the Jones Act, rather than a widow under DOHSA. We fail to see a basis for a different result. . . .
>
> We conclude that, while it is 'the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction'. . . , this Court is precluded by the established construction of the Jones Act from upholding the cause of action claimed by Mrs. Westcott." *Id.* at 1042-43.

The same year, the New York Court of Appeals below decided *Alvez* v. *American Export Lines, Inc.,* 46 N.Y.2d 634, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979). Concluding that the common law has now changed, and generally permits a wife to recover for loss of consortium the court stated:

> "In our opinion, examination of the *ratio decedendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight." 46 N.Y.2d at 639, App. D, at A12.

Similarly in *Doca* v. *Marina Mercante Nicaraguense, S.A.,* 474 F. Supp. 751 (S.D.N.Y. 1979), Judge Duffy of the Southern District of New York permitted the spouse of an injured longshoreman to recover for loss of consortium, noting the changes which had occurred since *Igneri* had been decided in 1963. However, in *Manolakis* v. *Indo Pacific Carriers, Inc.,* No. 78 Civ. 1075 (S.D.N.Y., June 27, 1979), Judge Sand, of the same court, granted a motion to dismiss a cause of action for loss of consortium to the

spouse of an injured seaman. Judge McGovern of the Western District of Washington permitted a jury verdict which included loss of consortium damages to the spouse of an injured longshoreman, which decision was affirmed by the Ninth Circuit without mentioning the consortium issue, in *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979).

Judge Tauro, of the District of Massachusetts, in *Short* v. *Exxon Co.* [1978] A.M.C. 1762, 1764 (D. Mass. 1977) questioned, without deciding, whether the wife of an injured harbor-worker has a cause of action for loss of consortium.

It is significant to note that only two federal appellate courts have squarely faced the issue of loss of consortium recovery by the spouse of an injured maritime worker. In its landmark *Igneri* decision, eleven years prior to *Gaudet,* the Second Circuit refused to permit such recovery to the spouse of an injured longshoreman. In *Christofferson,* decided two years after *Gaudet,* the Fifth Circuit found continued vitality in *Igneri,* and denied such recovery to the spouse of an injured seaman. Despite this, some lower federal and state courts have split as to the availability of such a cause of action, since *Gaudet.* As delineated in Point I (B), *supra,* although *Gaudet* has no applicability to a maritime personal injury action, its preachments have tended to foster nonuniformity in this area of Federal Maritime Law.

As predicted by this Court in *Moragne*: "In most respects the law applied in personal injury cases will answer all questions that arise in death cases." 398 U.S at 406. As is evident from the morass of lower court opinions generated by *Moragne* and its progeny, this prediction has been inverted, in that some lower courts felt themselves bound to

apply, in personal injury cases, the rules fashioned by this Court in wrongful death situations. It is indeed true, as noted in the *Gaudet* dissent, that the decision therein "will create difficulty and confusion in litigation of admiralty cases." 414 U.S. at 597 (Powell, J., dissenting). The uniformity which existed in maritime personal injury cases, prior to the wrongful death decision in *Gaudet,* should be reinstituted by this Court.

II.

Except for the Limited Geographical Boundaries of *Gaudet,* Federal Maritime Law Precludes Recovery for Nonpecuniary Damages in Death Actions.

A. Nonpecuniary Damages Are Proscribed by the Jones Act

In describing recovery under the Jones Act, Mr. Justice Cardozo, in *Warner* v. *Goltra,* 293 U.S. 155, 156 (1934) stated:

> "It gives to 'any seaman' injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees."

Similarly, it was held in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 407 (1970) that "the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers. . ."

Prior to the decision in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), it had long been held that recovery under the Jones Act could only be had for the pecuniary loss suffered by the seaman or his designated

beneficiaries. *See United States* v. *Boykin,* 49 F.2d 762 (5th Cir. 1931); *Savard* v. *Marine Contracting, Inc.,* 296 F. Supp. 1171 (D. Conn. 1969); *In re Risdal & Anderson, Inc.,* 291 F. Supp. 353 (D. Mass. 1968); *Tate* v. *C.G. Willis, Inc.,* 154 F. Supp. 402 (E.D. Va. 1957); *In re Southern Steamship Co.,* 135 F. Supp. 358 (D. Del. 1955); *Gerardo* v. *United States,* 101 F. Supp. 383 (N.D. Cal. 1951); *American Barge Line Co.* v. *Leatherman's Adm'x,* 306 Ky. 284, 206 S.W.2d 955 (1947). As the court in *American Barge, supra* at 957-58, stated:

> "Thus, the law seems to have been established in a case of this character that pecuniary loss or the reasonable expectation of such a loss is the only element of damage that may be considered in awarding a verdict. While loss of companionship, grief, mental distress are all very great and very real elements of human suffering for which no adequate measure of compensation ever exists in cases of this kind, yet the Federal Employers' Liability Act does not facilitate a requital for such evils, since the Act is solely one for dollar replacement, either for a momentary deprivation of the present or for one of reasonable anticipation of the future."

Even following the decision in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), it has been held that the Jones Act only permits recovery for pecuniary damages. *See Ivy* v. *Security Barge Lines, Inc.,* 585 F.2d 732 (5th Cir. 1978), *rehearing en banc,* No. 76-4130 (5th Cir., Nov. 13, 1979); *Standard Products, Inc.* v. *Patterson,* 317 So. 2d 376 (Miss. 1975). Indeed, as noted by *Ivy,* this Court in *Higginbotham* has also implicitly affirmed such an interpretation of the Jones Act in a wrongful death case. Although the decision did not specifically discuss the Jones Act, the existence of a Jones Act seaman "was raised squarely by

the facts, and urged on application for rehearing." *Ivy,* slip op. at 1061.

> "By deciding that pecuniary damages could not be recovered by any of the plaintiffs, including the representative of Shinn [a Jones Act seaman], the Supreme Court decided sub silentio that a Jones Act seaman's beneficiaries can not recover nonpecuniary damages for a death occurring on the high seas. Were nonpecuniary damages available under the Jones Act, although not under DOHSA, the Supreme Court would have affirmed as to Shinn while reversing as to the other plaintiffs." 585 F.2d at 738.

While the Jones Act contains no specific exclusion of nonpecuniary damages, it does incorporate the provisions of FELA, which has been authoritatively interpreted to so confine an award (as is discussed in Point II (B), *infra*).

> "To allow the recovery of nonpecuniary damages under the Jones Act merely because the accident occurred within territorial waters would not only be inconsistent with this policy and negate years of firmly established legal precedent, but would create two separate Jones Act remedies, each applicable only within its own geographical sphere. It would be anomalous indeed if we interpreted the Supreme Court's opinion to encourage the creation of needless disuniformity based solely on the place of the accident, bringing the law full circle from the days prior to *Moragne.*" *Id.*

Finally, in its rehearing en banc, the Fifth Circuit in *Ivy* delineated and rejected certain policy considerations touching on a "humanitarian" appeal for permitting such nonpecuniary damages.

> "There is superficial appeal in the argument that to award damages for loss of support would be humani-

tarian, and the correlative implication that to deny it is callous. The same emotive semantics would characterize as parsimonious and unfeeling any denial of any sort of nonpecuniary damage; awards for grief and anguish, for loss of consortium, for loss of affection or for any other sort of emotional distress could be justified by the same appeal that sentiment should disregard history and jurisprudence.

The Jones Act not only implicitly limits the kind of damages that may be recompensed; by incorporating remedies available under the F.E.L.A., it expressly permits only certain persons to receive even redress for pecuniary losses. A dependent, widowed mother may receive nothing for the death of her sole support if her son was married; a dependent, enfeebled aunt, who was actually being supported by her nephew, may recover nothing if her compassionate relative also had a parent, even a wealthy and completely self-supporting one. *See* 45 U.S.C. § 51. If sheer compassion alone dictates a change in the scope of the Jones Act with respect to items of damage, after more than six decades of consistent interpretation, or with respect to beneficiaries, for whom an even more compelling appeal can be made, the argument for change must be addressed to Congress, as the author of the Jones Act, for it is only under the authority of that statute that the plaintiff has a right to be in court." *Ivy,* slip op. at 1062, n.13.

B. Nonpecuniary Damages Are Proscribed by FELA

As previously noted in Point I (A), *supra,* FELA established a uniform rule, providing the exclusive method of recovery for damages sustained as the result of an injury to a covered employee. The same rule and policies underlying FELA also apply in wrongful death actions. *See Erie Railroad* v. *Winfield,* 244 U.S. 170 (1917); *Michigan Central Railroad* v. *Vreeland,* 227 U.S. 59 (1913).

In its seminal opinion on the proper interpretation of FELA, this Court decided more than sixty years ago in *Michigan Central, supra,* that the statute does not permit the recovery of nonpecuniary damages. That case involved an action brought by the widow of a railroad employee, for the loss suffered by her as a result of his wrongful death. This Court noted that two distinct causes of action existed, one for the injuries suffered by the decedent, and a second independent cause of action for the beneficiaries, for their losses as a result of the decedent's death.

In determining the damages which could be awarded under FELA, the Court could not simply conclude from the statutory language that only pecuniary losses could be recovered, since the word "pecuniary" does not occur in FELA. Indeed, the Court was not at all unaware of the very real nature of certain losses which would be characterized as nonpecuniary, and provided the following distinction between a pecuniary and a nonpecuniary loss.

> "A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.'" *Id.* at 71, *citing* Patterson, *Railway Accident Law,* §401.

For an analogy, the Court turned to Lord Campbell's Act, "the first act which ever provided for a cause of action

arising out of the death of a human being," and which had been adopted and modified in many of the state wrongful death actions. *Id.* at 69. Indeed, FELA was characterized by the Court as essentially a Lord Campbell's Act. *Id.* at 62. *See also Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 582 (1974); *Van Beeck* v. *Sabine Towing Co.,* 300 U.S. 342, 346 (1937) (as is the Jones Act); *Mellon* v. *Goodyear,* 277 U.S. 335, 345 (1928); *Martin* v. *Atlantic Coast Line Railroad,* 268 F.2d 397, 398 (5th Cir. 1959); *McCoullough* v. *Chicago, Rock Island & Pacific Railway,* 160 Iowa 524, 142 N.W. 67, 70-71 (1913).

Although Lord Campbell's Act also did not contain the word "pecuniary," this Court noted that such statute "and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage". 227 U.S. at 71. Therefore, in interpreting FELA, this Court ruled that only pecuniary losses may be compensated thereunder. This ruling has subsequently been reaffirmed by this Court. For example, in *Garrett* v. *Louisville & Nashville Railroad,* 235 U.S. 308, 312 (1914), it was held that a FELA wrongful death action on behalf of the stated beneficiaries "extends only to the *pecuniary* loss and damage resulting to them by reason of the death." (emphasis in original).

This ruling, limiting recovery under FELA to pecuniary loss, has been uniformly adhered to since the original decision in *Michigan Central, supra. See Mellon* v. *Goodyear,* 277 U.S. 335, 346 (1928); *Louisville & Nashville Railroad* v. *Holloway,* 246 U.S. 525, 527 (1918); *Chesapeake & Ohio Railway* v. *Kelly,* 241 U.S. 485, 489 (1916); *Garrett* v. *Louisville & Nashville Railroad, supra; North Carolina Railroad* v. *Zachary,* 232 U.S. 248, 256-57 (1914); *Gulf, Colorado & Santa Fe Railway* v. *McGinnis,* 228 U.S. 173, 175 (1913); *American Railroad* v. *Didrickson,* 227 U.S. 145, 150-51

(1913); *Martin* v. *Atlantic Coast Line Railroad,* 268 F.2d 397, 400 (5th Cir. 1959); *Stark* v. *Chicago, North Shore & Milwaukee Railway,* 203 F.2d 786, 788 (7th Cir. 1953); *Rodzik* v. *New York Central Railroad,* 169 F. Supp. 803, 806 (E.D. Mich. 1959); *Mobile & Ohio Railroad* v. *Williams,* 226 Ala. 541, 147 So. 819, 823, *cert. denied,* 290 U.S. 655 (1933); *McCoullough* v. *Chicago, Rock Island & Pacific Railway,* 160 Iowa 524, 142 N.W. 67, 70-71 (1913); *Simmons* v. *Louisiana Railway & Navigation Co.,* 153 La. 405, 96 So. 12 (1923); *Shaw* v. *Texas & Pacific Railway,* 170 So. 2d 874, 879 (La. App. 1965), *appeal denied,* 247 La. 621, 172 So. 2d 703 (1965); *Barnes* v. *Red River & Gulf Railroad,* 14 La. App. 188, 128 So. 724, 729 (1930); *Torchia* v. *Burlington Northern, Inc.,* 568 P.2d 558, 565 (Mo. 1977), *cert. denied,* 434 U.S. 1035 (1978); *St. Louis-San Francisco Railway* v. *Floyd,* 146 Okla. 42, 293 P. 250, 253-54 (1930); *Devine* v. *Southern Pacific Co.,* 207 Or. 261, 295 P.2d 201, 208 (1956); *Nashville, Chattanooga & St. Louis Railway* v. *Anderson,* 134 Tenn. 666, 185 S.W. 677, 681 (1916); *St. Louis, San Francisco & Texas Railway* v. *Geer,* 149 S.W. 1178, 1181 (Tex. Civ. App. 1912), *aff'd,* 109 Tex. 36, 194 S.W. 939 (1917); *see also Bolino* v. *Illinois Terminal Railroad,* 355 Mo. 1236, 200 S.W.2d 352, 357 (1947).

C. Nonpecuniary Damages Are Proscribed by DOHSA

Neither *Moragne,* which created a wrongful death cause of action under the General Maritime Law, nor *Gaudet,* which expanded the death remedy to include a claim for loss of consortium by a widow, involved DOHSA, since both involved accidents occurring within territorial waters. However, such an issue was faced by this Court in *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978). There, this Court only had to look to the statutory language of DOHSA.

> "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the

persons for whose benefit the suit is brought . . ." 46 U.S.C. §762 (emphasis added).

Since its provisions clearly limit the recovery permitted under DOHSA to "pecuniary loss," *Higginbotham* denied loss of consortium damages to the decedent's survivors. Indeed, no real determination had to be made:

> "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." 436 U.S. at 623.

Therefore, due to the clear applicability of DOHSA to deaths occurring beyond the territorial waters, recovery in such actions would be limited to "pecuniary loss." However, if the death occurs within the territorial waters, damages for nonpecuniary loss, such as loss of consortium, may be recovered. *See id.* at 626 (Marshall, J., dissenting). Due to the statutory provisions of DOHSA, the anomalous result was compelled after the decision in *Gaudet.*

Even prior to the decision of this Court in *Higginbotham,* DOHSA had uniformly been interpreted as limiting recovery solely to the pecuniary loss sustained. DOHSA and FELA have both been considered to be essentially Lord Campbell Acts (*Solomon* v. *Warren,* 540 F.2d 777, 788, n.12 (5th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *National Airlines, Inc.* v. *Stiles,* 268 F.2d 400, 404, n.4 (5th Cir.), *cert. denied,* 361 U.S. 885 (1959)), and to have the same measure of recovery. *Solomon, supra; National Airlines, supra; Middleton* v. *Luckenbach Steamship Co.,* 70 F.2d 326, 330 (2d Cir.), *cert. denied,* 293 U.S. 577 (1934); *The City of Rome,* 48 F.2d 333, 337 (S.D.N.Y. 1930). Therefore, recovery under DOHSA has been held to be limited to pecuniary loss, (*Solomon, supra; First National Bank* v. *National Airlines, Inc.,* 288 F.2d 621 (2d Cir.), *cert. denied,* 368 U.S. 859 (1961); *Middleton, supra; In re Risdal & Anderson, Inc.,* 291 F. Supp. 353 (D. Mass. 1968); *Gerardo* v. *United States,* 101 F. Supp. 383 (N.D. Cal. 1951); *The City of Rome, supra*) and recovery for loss of society or consortium has not been permitted. *Middleton, supra; Chute* v. *United States,* 466 F. Supp. 61 (D. Mass. 1978); *Thompson* v. *Offshore Co.,* 440 F. Supp. 752 (S.D. Tex. 1977) (although permitted under the General Maritime Law); *Gerardo, supra.*

Indeed, the only court which appears to have held that nonpecuniary losses could be recovered under DOHSA in spite of its statutory language, was the Fifth Circuit in *Law* v. *Sea Drilling Corp.,* 510 F.2d 242 (5th Cir.), *rehearing en banc denied,* 523 F.2d 793 (5th Cir. 1975). The court concluded that *Gaudet* had entirely replaced DOHSA, and therefore permitted such recovery. As this Court itself noted in *Higginbotham,* such an interpretation of *Gaudet* was possible, although incorrect. 436 U.S. at 623. (*See also* Gilmore & Black, *The Law of Admiralty,* §6-33, pp. 369-70 (2d ed. 1975), wherein the authors arrived at the same erroneous conclusion.) However, the *Higginbotham* Court clearly rejected such an interpretation of DOHSA, since Congress had already determined that nonpecuniary recovery was precluded by DOHSA. *Id.*

D. Nonpecuniary Wrongful Death Damages Have Only Been Permitted in Post-*Gaudet,* Non-Jones Act, Non-FELA, and Non-DOHSA Cases

The only area of maritime death cases wherein nonpecuniary damages, such as loss of consortium, have been permitted, are non-Jones Act, non-FELA, and non-DOHSA cases, decided after *Gaudet.* Recovery for loss of consortium damages had been uniformly denied prior to *Gau-*

det. See In re Canal Barge, 480 F.2d 11 (5th Cir. 1973), *on rehearing,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975) (General Maritime Law); *Simpson* v. *Knutsen,* 444 F.2d 523 (9th Cir. 1971) (Longshoreman); *In re United States Steel Corp.,* 436 F.2d 1256 (6th Cir. 1970), *cert. denied,* 402 U.S. 987 (1971) (General Maritime Law); *Nye* v. *A/S D/S Svendborg,* 358 F. Supp. 145 (S.D.N.Y. 1973), *modified on other grounds,* 501 F.2d 376 (2d Cir. 1974), *cert. denied,* 420 U.S. 964 (1975) (General Maritime Law); *Green* v. *Ross,* 338 F. Supp. 365 (S.D. Fla. 1972), *aff'd,* 418 F.2d 102 (5th Cir.), *cert. denied,* 414 U.S. 1068 (1973) (General Maritime Law); *Curry* v. *United States,* 338 F. Supp. 1219 (N.D. Cal. 1971) (Seaman suing under Suits in Admiralty Act and Public Vessels Act); *Smith* v. *Olsen & Ugelstad,* 324 F. Supp. 578 (E.D. Mich. 1971) (Longshoreman); *Valitutto* v. *D/S I/D Garonne,* 295 F. Supp. 764 (S.D.N.Y. 1969) (General Maritime Law), *cf. Strickland* v. *Nutt,* 264 So. 2d 317 (La. App.), *aff'd sub nom.,* De Rouen v. Nutt, 262 La. 1124, 266 So. 2d 432 (1972) (General Maritime Law, Jones Act, and DOHSA).

Following *Gaudet,* numerous courts have permitted loss of consortium damages in non-DOHSA maritime death actions, as mandated by *Gaudet. See Morvant* v. *Construction Aggregates Corp.,* 570 F.2d 626 (6th Cir.), *cert. dismissed,* 99 S. Ct. 44 (1978) (General Maritime Law); *Landry* v. *Two R. Drilling Co.,* 511 F.2d 138 (5th Cir.), *rehearing en banc denied,* 517 F.2d 675 (5th Cir. 1975) (General Maritime Law); *Skidmore* v. *Grueninger,* 506 F.2d 716 (5th Cir. 1975) (General Maritime Law); *McDonald* v. *Federal Barge Lines, Inc.,* 496 F.2d 1376 (5th Cir. 1974) (General Maritime Law); *In re Canal Barge,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975) (General Maritime Law); *Moll* v. *Southern Charters, Inc.,*

81 F.R.D. 77 (E.D.N.Y. 1979) (General Maritime Law); *Fitzgerald* v. *Angela Compania Naviera, S.A.,* No. 74 Civ. 1293 (S.D.N.Y., Feb. 23, 1978) (General Maritime Law); *Thompson* v. *Offshore Co.,* 440 F. Supp. 752 (S.D. Tex. 1977) (General Maritime Law); *Consolidated Machines, Inc.* v. *Protein Products Corp.,* 428 F. Supp. 209 (M.D. Fla. 1976) (General Maritime Law, but not permitting if injured); *Hebert* v. *Otto Candies, Inc.,* 402 F. Supp. 403 (E.D. La. 1975) (General Maritime Law); *Carrillo* v. *Samaeit Westbulk,* 385 F. Supp. 119 (D.P.R. 1974), *modified on other grounds,* 514 F.2d 1214 (1st Cir. 1975) (Longshoreman); *In re Farrell Lines, Inc.,* 378 F. Supp. 1354 (S.D. Ga. 1974), *rev'd on other grounds,* 530 F.2d 7 (5th Cir. 1976) (General Maritime Law); *cf. McMillan* v. *Marine Sulphur Shipping Corp.,* No. 79-7054, at n. 1 (2d Cir., Oct. 9, 1979) (reversing on other grounds consortium award to widow of longshoreman, and questioning its maintainability).

However, it is significant to note that the courts in *Morvant, Landry,* and *Thompson, supra,* clearly stated that although such recovery was now permitted under the General Maritime Law, it still was not permitted under the Jones Act. *Cf., Higginbotham,* as explained by *Ivy,* 585 F.2d at 738, and discussed in Point II (A), *supra.* Finally in its rehearing en banc, the Fifth Circuit in *Ivy* noted that neither *Moragne* nor *Gaudet* involved Jones Act seamen, only claims for unseaworthiness under the General Maritime Law. The en banc court held that it could not supplement the damages provided in the Jones Act with the damages available under *Moragne* and *Gaudet.*

> "To consider the *Moragne-Gaudet* result a supplemental remedy to the Jones Act when the suit is for negligence only is not to supplement the statute but

to alter the interpretation it has continuously received." *Ivy*, slip op. at 1060.

The policies of uniform recovery underlying the creation of the *Moragne* wrongful death remedy have been undermined by *Gaudet*. That decision permitted nonpecuniary recovery under the General Maritime Law if the injury causing death occurred within territorial waters, when such damages are precluded in death actions under the Jones Act, FELA, and DOHSA.

III.

Even In Its Sphere of Wrongful Death Damages, *Gaudet* Has Revived the Nonuniformity In Federal Maritime Law Which *Moragne* Had Sought to Eliminate.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) created a wrongful death cause of action under the General Maritime Law. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1973) expanded the *Moragne* wrongful death remedy so as to include a claim for loss of consortium by a widow. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) refined *Gaudet*, explained its limitations, and signalled a retreat from the broad reading certain courts had ascribed to that decision, by holding that consortium damages could not be recovered when DOHSA is applicable. Although the policy of uniformity in Federal Maritime Law was expressed in each of these decisions, it is respectfully submitted that *Gaudet* disregarded "the source of law endorsed by *Moragne*, as well as the concern for uniformity expressed in that opinion." 414 U.S. at 596 (Powell, J., dissenting).

In *Moragne*, the Court was careful to note that there was no Congressional policy against permitting recovery for wrongful death, citing DOHSA and the Jones Act. Indeed,

the Court noted "a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." 398 U.S. at 393. The Court paid special deference to Congressional enactments in similar areas in determining the policy which must be applied in fashioning rights and remedies, and was encouraged "that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* The Court rejected the argument that overruling *The Harrisburg*, 119 U.S. 199 (1886), would require explanation by future decisions to define a new cause of action. Instead of creating a new body of Federal Maritime Law, the *Moragne* court stated that its decision only removed the preclusion under the existing General Maritime Law. *Id.* at 405-06.

In *Gaudet*, the question as fashioned by this Court, was "whether the widow of a longshoreman may maintain such an action for the wrongful death of her husband—alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters—after the decedent recovered damages in his lifetime for his injuries." 414 U.S. at 574. The Court rejected any *res judicata* bar to such an action, holding that *Moragne* had created a true wrongful death remedy separate and independent from any action which the decedent may have had during his lifetime for his injuries. *Id.* at 578. Noting that the majority of state and federal wrongful death statutes, including FELA, had been held to bar a cause of action for wrongful death by the decedent's recovery during his lifetime, *Gaudet* stated that such a result derived from a statutory remedy, and therefore restrictions could validly be imposed on the right to recover. *Id.* at 579. However, since *Moragne* was not a statutory remedy, but had been created by this Court, *Gaudet*, citing *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md.

1865) (No. 12,578) and the "humane and liberal character" of admiralty to compensate dependents for their losses, held that there was not any "statutory language or 'established and inflexible rules' of maritime law [to] require a contrary conclusion." *Id.* at 583.

It is this reasoning that is perplexing. Although the *Moragne* Court noted that due deference be given to similar Congressional enactments in first pronouncing the admittedly judicially created maritime wrongful death remedy, *Gaudet* denied, or at least sought to avoid, the relevance of such considerations for the very reason that the *Moragne* remedy had been judicially and not statutorily created. Additionally, as noted by the dissent, the direction in *Moragne* to comport with state courts and state wrongful death statutes, was ignored by *Gaudet,* since the majority of such statutes hold that recovery in a personal injury action precludes a subsequent wrongful death action, as does the Restatement of Torts. *Id.* at 602-603. (Powell, J., dissenting).

Gaudet then defined loss of society to include "love, affection, care, attention, companionship, comfort, and protection," although it specifically excluded mental anguish or grief. 414 U.S. at 585. (The practical problems with this definition were amply stated in *Higginbotham,* 436 U.S. at 623, n.17.) Although the *Gaudet* Court noted that the early wrongful death statutes had been interpreted to preclude such nonpecuniary recovery, and that DOHSA explicitly proscribes it, it stated that the majority of states now permit recovery for loss of society either by statutory or judicial decision. Therefore, *Gaudet* concluded that permitting recovery for loss of society merely brought the maritime wrongful death remedy into accord with the majority of state wrongful death remedies. *Id.* at 586-88. Contrary to distinguishing *Moragne* from the statutory remedies, the

Gaudet Court then strove to conform the recovery permitted in a *Moragne* wrongful death action with the state wrongful death remedies. As the *Gaudet* dissent noted, the majority opinion rejected the Congressional purposes expressed in DOHSA and the Jones Act against awarding nonpecuniary damages, since neither Act, as interpreted, was supportive of the majority's opinion. *Id.* at 605-06 (Powell, J., dissenting). The rationale of applying a judicially created remedy to a statutory provision such as DOHSA is questionable, as this Court subsequently noted in *Higginbotham,* 436 U.S. at 625.

The *Gaudet* Court also speculated that permitting recovery of nonpecuniary damages under the *Moragne* wrongful death remedy would not subject the shipowner to double liability, since any possible overlap could be controlled by "application of familiar principles of collateral estoppel." 414 U.S. at 592. As noted in the dissent this would probably create more problems than it resolved, *Id.* at 608 (Powell, J., dissenting), and providing a decedent's family with a second opportunity to recover such subjective damages may well result in its receiving "substantially more than just compensation for its injuries." *Id.* at 609.

This Court has long been concerned with the correction of anomalies in a uniform body of Federal Maritime Law, especially in personal injury and death cases, and specifically with aberrations hinging upon the geographic location of the tort or injury. *Moragne* (398 U.S. at 395-96, and referred to in *Gaudet,* 414 U.S. at 576-77) attempted to resolve such anomalies, including "the strangest," that true seamen had no wrongful death remedy for unseaworthiness within territorial waters (citing *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964)) whereas longshoremen, or surrogate seamen, do if permitted by applicable state

statutes. Therefore *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886), to rectify this anomaly so that the rights of longshoremen, who had gradually been elevated to the status of seamen, would not be propelled beyond seamen in wrongful death cases.

It should be noted that the decision in *Higginbotham* also encouraged a geographically based anomaly. The Court was not unaware of such a result.

> "It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute." 436 U.S. at 624 (footnote omitted).

However, when the applicability of DOHSA in such a situation first faced this Court in *Higginbotham*, the *Gaudet* decision awarding loss of consortium damages had already been made. The decision in *Higginbotham* was compelled by the statutory language of DOHSA; the only manner in which to avoid any distinctions therein would have been to overrule *Gaudet*.

Herein the Court is faced with a different situation. Although certain distinctions are possible between death and injury, these differences are certainly more worthy of consideration than the callous dismissal of such anomalies in admiralty by the New York Court of Appeals below, as "a currently accepted fact of life." 46 N.Y.2d at 640-41, App. D at A14. In *Higginbotham*, the Court was confronted with the clear applicability of a statute compelling that a distinction be made. Here, the Court has the opportunity to avoid yet another anomaly by adopting, in a harbor worker's personal injury action, the Jones Act proscription against loss of consortium.

The *Gaudet* dissent also noted the concern expressed by Mr. Justice Harlan in his majority opinion in *Moragne* regarding the overruling of prior decisions. However, the Court concluded that *The Harrisburg* should be overruled as an "unjustified anomaly." *Id.* at 404. As the *Gaudet* dissent noted:

> "The substantive rule rejected today is no comparable anomaly. It has been the generally applied doctrine since wrongful-death actions were introduced in this country. It has been the rule of the relevant federal statutes since their inception, and Congress has not modified the rule during that entire period. It was the rule announced in *Mellon* [v. *Goodyear*, 277 U.S. 335 (1928)] and *Flynn* [v. *New York, New Haven & Hartford Railroad*, 283 U.S. 53 (1931)] *supra*, cases the Court chooses not to follow today. And, unlike the opinion in *Moragne*, the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule." 414 U.S. at 613 (Powell, J., dissenting).

Concerning geographic anomalies, the *Gaudet* dissent indicated the lack of uniformity which would be created by the majority decision, since the locale of the seaman's injuries would be determinative of his available remedy. *Id.* at 601. If the injury occurred on land, then a Jones Act suit would preclude a subsequent wrongful death action; however, if the injury occurred at sea, then *Gaudet* recovery would be permitted. Such a result, the dissent felt, also portended a subsequent overruling of the line of cases commencing with *Mellon* v. *Goodyear*, 277 U.S. 335 (1928), in order to remove such an anomalous result. *Id.* at 612-13.

The *Gaudet* decision, as interpreted and refined by *Higginbotham*, engenders a further geographically based

anomaly in maritime wrongful death actions. As specified in Point II, *supra,* nonpecuniary wrongful death recovery, such as loss of consortium, is proscribed by the Jones Act, FELA, and DOHSA; nevertheless, such damages may be recovered in a *Gaudet* General Maritime Law wrongful death action, if the injury causing death occurs within territorial waters. Such an anomaly has no proper place in the uniform body of Federal Maritime Law.

IV.

To Achieve Uniformity, Parity, and Fairness, Treatment Similar But Not Superior to Seamen Has Historically Been Afforded to Longshoremen.

This Court has often indicated its policy of uniformity regarding injuries to similarly situated persons on vessels, irrespective of their status as longshoremen or seamen. In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), a cause of action for unseaworthiness was created for longshoremen under the General Maritime Law. It was reasoned that the two classes of workers—seamen and longshoremen—engaged in a common pursuit for the shipowner, should be afforded the same protection under the law.

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact

> that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship." *Id.* at 99 (footnote omitted).

Hence, this Court elevated the status of longshoremen to that of their seamen prototypes.

This Court has taken care to treat longshoremen and seamen equally or nearly so, but has avoided propelling longshoremen to a position beyond that of seamen.

> "On the one hand, it may be urged that *Sieracki* broadened the rights of shore workers; it gave them a seaman's status without depriving them of the right of action they had before they attained that status. On the other, it may be urged with equal reason that a longshoreman should not be able to 'play it both ways': be entitled, that is, to a seaman's remedy for unseaworthiness and also enjoy recovery from the shipowner for negligence which, prior to the Jones Act, was denied to a seaman. He would thus have available two non-statutory remedies to recover damages for his injuries, while the crew member, the true 'ward of admiralty,' has only one. And the fact that Congress in the Jones Act has given crew members a statutory cause of action for negligence hardly justifies this Court's according longshoremen alternative remedies, any more than we should now define the crew members' rights as including compensation under the Longshoremen's and Harbor Workers' Compensation Act." *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 417-18 (1953) (Frankfurter, J., concurring).

Similarly, Congress recognized the distinction between longshoremen and seamen when it first enacted the LHWCA in 1927. As that Act was originally drafted, its provisions included seamen; however, Congress acceded to the request of the seamen to be removed from coverage under the Act, as they preferred to retain their rights under the Jones Act. 68 Cong. Rec. 5402-03, 5410-11, 5414 (1927). *See also Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 124 (1962); *Nogueira* v. *New York, New Haven & Hartford Railroad*, 281 U.S. 128, 136 (1930). *See generally Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-65 (1977) (regarding the original LHWCA and the 1972 Amendments thereto).

As reaffirmed in *Moragne*, this Court will defer to Congressional enactments in similar areas, to determine the policy to be applied in determining rights and remedies. 398 U.S. at 392-93. Here, however, as differentiated from the situation presented in *Moragne*, Congress *has* provided an "affirmative indication of an intent to preclude the judicial allowance," *id.*, of loss of nonpecuniary damages in a maritime personal injury action—namely the preclusion of such recovery under the Jones Act, and the failure of Congress to change the result denying recovery to longshoremen when it adopted the 1972 Amendments to the LHWCA.

This Court has clearly adopted such reasoning in the past. In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), a seaman drowned within territorial waters, and the Court reaffirmed the rule of *Lindgren* v. *United States*, 281 U.S. 38 (1930) that the Jones Act provided the uniform, exclusive negligence remedy for such death, thereby obviating the applicability of state wrongful death statutes. In the majority opinion, Mr. Justice Black held:

> "Thirty-four years have passed since the *Lindgren* decision, and Congress has let the Jones Act stand with the interpretation this Court gave it. The decision was a reasonable one then. It provided the same remedy for injury or death for all seamen, the remedy that was and is provided for railroad workers in the Federal Employers' Liability Act. Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act." 379 U.S. at 155 (footnotes omitted).

Consideration should also be given to the *Igneri* rule precluding consortium recovery by the spouse of an injured longshoreman. That decision was rendered more than fifteen years ago by the Second Circuit, the "most experienced of admiralty courts." *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 393 (1949); *see also id.* at 403 (Jackson, J. dissenting); *Calmar Steamship Corp.* v. *Scott*, 345 U.S. 427, 433 (1953). The decision in *Igneri*, uniformly accepted and applied throughout the country until some questions were raised following *Gaudet* eleven years later, clearly denied recovery for loss of consortium to the spouse of an injured longshoreman. If Congress were not satisfied with such a result, it could have permitted recovery for loss of consortium when it amended the LHWCA in 1972, to remove both the shipowner's liability for unseaworthiness to longshoremen, and the concomitant right of the shipowner to implead the longshoremen's stevedore employer. *Igneri* had been decided nearly ten years previously, and at that time its validity had not been questioned.

Although this Court often fashions admiralty law, it will defer to the judgment of Congress, which "has para-

mount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 215 (1917). Since it may reasonably be assumed that Congress was satisfied with the *Igneri* interpretation denying consortium recovery to the spouse of an injured longshorman, this Court should therefore respectfully defer the legislative function to Congress, as it did in *Gillespie* regarding the Jones Act.

V.

Variation and Discrimination Would Destroy Uniformity In the Federal Maritime Law.

Exclusive admiralty jurisdiction is granted to the Federal District Courts pursuant to 28 U.S.C. §1333; however, that section also saves "to suitors in all cases other remedies to which they are otherwise entitled." It is settled law that although this statutory language permits an injured maritime worker to choose between bringing his suit in state or federal court, Federal Maritime Law will govern all such actions, wherever brought. *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239, 245-46 (1942); *Alvez* v. *American Export Lines, Inc.,* 46 N.Y.2d 634, 638, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979).

The uniformity doctrine in maritime law has its ultimate basis in the United States Constitution. Article III, Section 2 of the Constitution extends the judicial power "to all Cases of Admiralty and maritime Jurisdiction." As was long ago interpreted by the Court in *The Lottawanna,* 88 U.S. (21 Wall.) 558, 575 (1874), "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country." Such a doctrine has been constantly reaffirmed in the area of mari-

time death and personal injury actions, as this Court stated in *Moragne* in justifying the rationale for establishing a maritime wrongful death cause of action. The Court, citing *The Lottawanna,* stated:

> "Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 401-402.

State statutes are not applicable in areas where the "necessary consequences would be destruction of the very uniformity in repect to maritime matters which the Constitution was designed to establish . . ." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 217 (1917). Therefore, the availability or non-availability of a cause of action by a wife to recover loss of consortium for injuries to her husband under New York law, or under the law of any other state, is wholly irrelevant. *See, e.g., Igneri,* 323 F.2d at 259; *Davidson* v. *Schlussel Reederi KG,* 295 So. 2d 700, 701 (Fla. App. 1974). This was the uniform policy of the Federal Maritime Law which *Moragne* sought to create in regard to wrongful death remedies.

The New York Court of Appeals below acknowledged that Federal Maritime Law governed its determination of this issue (46 N.Y. 2d at 638-39, App. D at A10-A12), and then summarily disregarded the precedential authority of *Igneri* and *Christofferson* (discussed in Point I, *supra*). *Id.* at 641-42, App. D at A14-A16. The court tentatively set sail in what it considered to be uncharted waters and permitted recovery, thereby effectively scuttling the doctrine of uniformity in the application of Federal Maritime Law. The court below committed the error common to virtually all of

the decisions which declined to follow the *Igneri* rule denying consortium recovery. It relied on the subsequent changes in the common law, which now generally permits a wife's cause of action for loss of consortium. *See* 46 N.Y. 2d at 639-40, App. D at A12-A14. *See Doca* v. *Marina Mercante Nicaraguense, S.A.*, 474 F. Supp. 751, 757 (S.D.N.Y. 1979); *Hubschman* v. *Antilles Airboats, Inc.*, 440 F. Supp. 828, 858-59 (D.V.I. 1977); *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927, 929-30 (S.D.N.Y. 1977), *appeal denied*, No. 77-8014 (2d Cir., Feb. 17, 1977); *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451, 454 (1975). However, as detailed in Part I (A), *supra*, although *Igneri* looked to the common law, it did not base its decision thereon; rather, it rested on the preclusion of such a cause of action to the spouse of a seaman under the Jones Act. As this Court noted in *Moragne*, admiralty law has always "been a thing apart from the common law . . . ow[ing] a much greater debt to the civil law." 398 U.S. at 386-87.

In relying on the subsequent changes in the common law permitting a wife's cause of action for loss of consortium in a non-maritime context, these courts raise an obvious red herring in the sphere of damages recoverable in maritime personal injury actions. It should be noted that no discrimination on the basis of sex exists in maritime personal injury actions.

> "Equality of the sexes is the rule in actions governed by maritime law. The spouse of a stevedore injured aboard ship is denied recovery for loss of consortium regardless of the sex of the stevedore." *Davidson* v. *Schlussel Reederi KG*, 295 So. 2d 700, 700-01 (Fla. App. 1974).

The only discrimination which could result in this situation, would be to permit the spouse of an injured longshoreman to recover for loss of consortium, even though the Jones Act clearly precludes such recovery to the spouse of an injured seaman. The prevention of such an anomaly regarding the damages recoverable in maritime personal injury actions was the specific goal of the Second Circuit in *Igneri*:

> "[O]ur duty to avoid capricious differences in treatment between similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position than the spouse of a seaman." 323 F.2d at 267.

Indeed, such an anomalous result would also be truly ironic in this case, inasmuch as respondent Alvez was regularly employed as a seaman, but happened to be moonlighting as a harbor worker at the time of his accident. (Statement, *supra*). Policy, fairness, and logic, clearly evince that such a result, as decided below by the New York Court of Appeals created an unnecessary and unfair distinction, and should be reversed by this Court.

CONCLUSION

It is respectfully requested that the decision of the New York Court of Appeals below be reversed, and the amended complaint not be permitted.

Respectfully submitted,

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